IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR PETITIONER

The Government agrees (p. 8) that the Treaty meant to assure the Indians that they could hunt and fish within the reservation in their accustomed way. But, says the Government, the Indians' rights are like *off*-reservation treaty fishing rights, which are subject to some State regulation. The Government cites *Race Horse*, *Winans*, *Seufert*, and *Tulee*, but only the latter is really in point.

We maintain that the Menominee hunting and fishing rights within the former reservation are not subject to any regulation at all by the state or federal governments. The predominant aspect of off-reservation rights is that both Indians and non-Indians are sharing the same game or fish resource, and the problem is how to effectuate the

treaty so as to give the Indians something more than they already have as ordinary citizens, without endangering the resource which both Indians and non-Indians are entitled to exploit.

The problem of sharing has little or no importance in this case, because the Indians still own the entire reservation, and they need not, and do not, share their hunting and fishing on the reservation with non-Indians. Perhaps to some extent the roaming-zone of the fish or game on the reservation may extend outside the reservation, and where it does, non-Indians would have a legitimate interest in conservation.[1]

But if we are wrong, and if rights within the former reservation are considered the same as off-reservation treaty fishing rights, then the correct rule is as laid down by this Court in *Tulee*[2] and interpreted by the Ninth Circuit.[3] The *Tulee* case holds that off-reservation treaty fishing (and presumably hunting) rights are subject to such State regulations "as are necessary for the conservation of fish . . . ."[4] The Ninth Circuit construes "necessary" to mean just that, and that means that Indian fishing can be curtailed only if curtailment of non-Indian fishing is not enough to achieve proper conservation.[5]

The Government (p. 9) characterizes the State rule against transporting a loaded and uncased gun in an auto-

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[1] We would concede, as the Government suggests (p. 8), that the Indians' right to hunt or fish should not be so absolute as to allow total depletion of a game or fish resource which extends outside the reservation.

[2] 315 U.S. 681 (1942).

[3] *Holcomb* v. *Confederated Tribes*, 382 F.2d 1013 (9th Cir. 1967). See full treatment in note 31 of our main brief.

[4] 315 U.S. at 684.

[5] *Holcomb*, above; *Maison* v. *Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den., 375 U.S. 829; *Makah Tribe* v. *Schoettler*, 192 F.2d 224 (9th Cir. 1951).

mobile as a "safety regulation." We think the purpose of this rule is sportsmanship rather than safety or conservation. The rule appears in Section 10.07(3) of the Wisconsin Administrative Code, entitled "Hunting, prohibited methods," which subsection also forbids shooting from autos, use of nets or snares; possessing firearms while shining deer, etc. These are not safety regulations.[6] We think the same is true of the rule against hunting deer with an artificial light. For non-Indians, this is unsportsmanlike,[7] but for an Indian it may be the only way he can catch enough deer to last him over the winter.

Respectfully submitted,

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January 15, 1968

[6] See other State regulations cited in our main brief, note 16.

[7] This is not a "necessary" conservation measure as the Government indicates (p. 9), because so far as non-Indians are concerned, the bag limit of one deer a day completely assures conservation, leaving no need for such additional conservation, if any, as might be provided by a rule against "shining" deer.